95

IN THE

U. S. CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

F. V. McDONALD,
Plaintiff in Error,
vs.
DOLPHUS B. HANNAH ET. AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

W. C. SHARPSTEIN,
Attorney for Defendants in Error.

TACOMA, WASHINGTON:
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1893.

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STATEMENT OF FACTS.

The plaintiff claims title to the premises in controversy by several distinct chains:

FIRST CHAIN.

1. Deed from Mary A. Givens to plaintiff, dated October 17th, 1888.

Exhibits A and B, Record, pp, 46 to 51.

2. Decree of the United States Circuit Court of the District of Washington in a suit wherein the plaintiff in error was complainant and a large number of parties were defendants, the defendants herein not being of the number, which suit was for the partition of a tract of sixty acres of which the premises in controversy were a part, dated November 25th, 1891, in which decree the premises in controversy were allotted to plaintiff herein.

Exhibit C, Record, pp. 51 to 73.

SECOND CHAIN.

1. Patent of the United States to Thomas Hood, 160 acre tract.

Exhibit F, Record, pp. 86-87.

2. Deed from Thomas Hood to C. P. Ferry and L. C. Fuller; same land as above.

Exhibit G, Record, pp. 88-89.

3. Deed from L. C. Fuller and wife and C. P. Ferry and wife to E. M. Burton; same land as above.

Exhibit H, Record, pp. 89 to 92.

4. Deed of E. M. Burton and wife to L. C. Fuller and C. P. Ferry; same land as above.

Exhibit I, Record, pp. 92 to 94.

5. Deed of L. C. Fuller and wife and C. P. Ferry and wife to the Workingmen's Joint Stock Association, of Portland, Oregon; 60 acres of above.

Exhibit J, Record, pp. 94 to 96.

6. Deed of L. C. Fuller and wife and C. P. Ferry and wife and the Workingmen's Joint Stock Association, of Portland, Oregon, to William Brown, 39-464, George Luviney 65-464, John Huntington, John Donaldson, Edward Simmons, Charles Gilbert, George P. Riley, George Thomas, James H. Givens, Charles Howard, Mary H. Carr, Anna Rodney, George Washington, Philip Francis, 30-464 each, of 60-acre tract, dated February 10th, 1871.

Exhibit K, Record, pp. 97 to 99.

James H. Givens died in 1872; Mary A. Givens was his wife. They had no children. Upon proof of these facts it was assumed that the interest of James H. Givens descended to Mary A. Givens.

Bill of Exceptions, Record, p. 36.

THIRD CHAIN.

1. Continuing from the second chain of title ending in Exhibit K, the plaintiff in error introduced a power of attorney from the persons named as grantees, in Exhibit K, to one John W. Matthews, constituting him "Our true and lawful attorney for us and in our

names, place and stead, to grant, bargain, sell, convey, alien, remise, release, quit-claim, assign or transfer all such lands for such sum or price and on such terms as to him shall seem meet." * * * * * * "And for all the powers aforesaid for us and in our names to make, execute, acknowledge and deliver all necessary deeds, with or without seal." This power of attorney is dated September 5th, 1871.

Exhibit L, Record, pp. 99 to 102.

2. A deed from John W. Matthews, as attorney in fact for all of his principals except James H. Givens, to Mary A. Givens, of the premises in controversy.

Exhibit M, Record, pp. 102 to 105.

ARGUMENT ON THIRD CHAIN OF TITLE.

For the purpose of argument we will examine these three chains of title separately, beginning with the last. Conceding, for the sake of the present argument, that title had been conveyed to all the persons named as grantors in the power of attorney to John W. Matthews, did that instrument confer authority upon the attorney in fact to convey the premises described in the power? By examining the instrument itself, found on pages 100 and 101, it will be observed that the name of one of the principals, Ed. S. Simmons, appears as having been attached to the power in this manner:

ED. S. SIMMONS,
By A. S. GROSS, Attorney. [SEAL.]

The name of another principal, George Thomas, appears thus:

GEORGE THOMAS,
By GEO. P. RILEY, proxy. [SEAL.]

And the name of another principal, Anna Rodney, appears thus:

ANNA RODNEY,
Per CHAS. [her X mark.] HOWARD, her proxy. [SEAL.]

The authority of Gross, Riley and Howard for thus signing the names of persons purporting to be principals, is not shown, and under the decision of the Supreme Court of the United States in

Denn vs. Reid, 10 Peters, 524;

and of the Supreme Court of Washington in

Territory vs. Klee, 1 Washington, 183, 187,

the execution of this power of attorney as to Simmons, Thomas and Rodney was ineffectual, and the attorney in fact could not convey the interests of these parties. But we contend that the power was joint, and that if it was inoperative as to any of the principals it was inoperative as to all.

The deed (Exhibit M, Record, pp. 102-105) which purports to have been executed by John W. Matthews, as attorney in fact, for all of the persons named in the power of attorney, with the exception of James H. Givens, whose name does not appear in the instrument at all, was, on account of the objections urged to the

power itself inoperative to convey title to Mary A. Givens. But in addition to the objections urged to the power of attorney, the further objection is made that at the time of the execution of Exhibit M, James H. Givens, one of the principals named in the power of attorney, was dead,

(Record, page 36,)

and under the familiar rule that the death of the principal operates as a revocation of the agent's authority, where that is not coupled with an interest, the deed conveyed no title to Mary A. Givens

Frink vs. Roe, 70 Cal., 296.

S. C. 11 Pac. Rep., 820.

McClaskey vs. Barr, 50 Fed. Rep., 412.

And where the power is a joint power, the death of one extinguishes the entire power.

Hanrick vs. Patrick, 119 U. S., 156.

S. C. 7 S. Ct. Rep., 147.

Rowe vs. Rand, 111 Ind., 206.

S. C. 12 N. E. Rep., 377.

Gilbert vs. Howe, 45 Minn., 121.

S. C. 47 N. W. Rep., 643.

Louis vs. Elfelt, 89 Cal., 547.

S. C. 26 Pac. Rep., 1095.

ARGUMENT ON SECOND CHAIN OF TITLE.

Going back to the next preceeding deraignment of title, to-wit: That proceeding from the patent of the United States we observe first, that the deed (Exhibit G, Record, pp. 88 and 89) purports to have been acknowledged before one "R. Wilcox, Clerk of the District Court of the United States for the District of Oregon," and the venue of the certificate as follows: "United States of America, District of Oregon." This instrument purports to have been acknowledged on the 14th of September, 1868. At that time the Act of January 31st, 1867, was in force, which provided "That deeds * * of lands * * situated in this Territory may be executed or acknowledged in any other state or territory of the United States in the form prescribed for executing and acknowledging deeds within this Territory, and the execution thereof may be acknowledged before any judge of a court of record, notary public, justice of the peace, or before any commissioner appointed by the Governor of this Territory for such purpose."

Statutes Washington, 1873, p. 465.

Abbott's Real Property Statutes, p. 275.

No act has ever been passed by the Legislature of Washington permitting the Clerk of the United States District Court of another State to take acknowledgments of deeds unless a subsequent statute, Act of No-

vember 13th, 1873, providing that "Deeds * * * of land * * * situated in this Territory may be executed or acknowledged in any other state or territory of the United States, in the form prescribed for executing and acknowledging deeds within this Territory, and the execution thereof may be acknowledged before any person authorized to take acknowledgments of deeds by the laws of the state or territory wherein the acknowledgment is taken, or before any commissioner appointed by the Governor of this Territory for such purpose."

Statutes Washington, 1877, p. 312.

Abbott's Real Property Statutes, p. 276.

Or the further provision that "All deeds heretofore acknowledged according to the provisions of this Act, are hereby declared legal, * * * *

Statutes Washington, 1887, p. 312,

Abbott's Real Property Statutes, p. 276,

includes such officer.

Referring to the laws of Oregon at the time this deed was acknowledged, we find that the persons authorized to take acknowledgments are as follows; Any Judge of the Supreme Court, County Judge, Justice of the Peace or Notary Public within the State.

Gen. Laws of Ore., compiled and annotated by M. P. Deady, Section 10, Page 648.

This law has never been altered, and there has never been any legislation on the part of the Legislature of Washington making valid acknowledgments taken by persons not authorized to take them.

Passing from this instrument we come to the deed, (Exhibit K, Record, pp. 97, 99), which purports to convey to a number of persons undivided interests, among others James H. Givens a 30-464 interest in and to a sixty-acre tract, embracing the premises in controversy. James H. Givens died in 1872. At the time of his death he was married to Mary A. Givens. Givens and his wife were married before coming to Portland, Oregon, to which place they came from New Bedford, Mass. From the time of their arrival in Portland to the time of the death of James H. Givens, Portland was their residence, and they never resided in Washington Territory.

Par. 6, Bill of Exceptions, Record, p. 36.

At the time of the making of the deed purporting to convey to James H. Givens an undivided 30-464 interest in and to the sixty acres there was in force in the Territory of Washington the Act of December 2d, 1869, entitled "An Act defining the rights of husband and wife."

Statutes Washington, 1869, p. 318-323,

Abbott's Real Property Statutes, pp. 417, 474,

which provides, among other things, that "All property

acquired after the marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property." (Sec. 2).

"In every marriage hereafter contracted in this Territory the rights of husband and wife shall be governed by this Act." * * * * (Sec. 11).

"The rights of husband and wife married in this Territory, prior to the passage of this Act, or married out of this Territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this Act, with respect to such property as shall be hereafter acquired." * * * (Sec. 12).

Side by side with this law there existed an act entitled "An Act relating to estates in dower and by the courtesy," approved January 30th, 1864.

Statutes Washington, 1863-4, p. 6-12,

Abbott's Real Property Statutes, p. 468-470,

which provides "That the widow of every deceased person shall be entitled to dower for the use during her natural life of one-third part of all the lands whereof her husband was seized, of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." (Sec. 1.)

* * * * "Any woman residing out of the Territory shall be entitled to dower of the lands of

her deceased husband, lying in this Territory, of which her husband died seized, and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within the Territory at the time of his death." (Sec. 21.)

It will thus be seen that the Act of 1869 affected only those persons who had been married within the Territory prior to the passage of the Act, or who had been married out of the Territory, but who should subsequently reside and acquire property in the Territory, and that the Act relating to dower, although it was undoubtedly repealed by implication, so far as residents of the Territory were concerned, who came within the designation described in Section 12 of the Act of 1869, the status of parties residing out of the Territory was left unaffected, and the widow was only entitled to a dower interest. Before the death of James H. Givens, an act was passed entitled "An Act defining the rights of persons and property, as affected by marriage," approved November 29th, 1871.

Statutes of Washington, 1871, p. 67-74.

Abbott's Real Property Statutes, p. 474-478.

This act was, in all respects, so far as the questions involved in this case are concerned, similar to the Act of 1869, with the exception that by section 23 of the act it was provided "Neither dower or courtesy shall hereafter accrue," but by Section 25 of the same act it is as-

serted "The rights of all married persons now living in this Territory, and of all who shall hereafter live in this Territory, shall be governed by this Act." This statute adhered in unmistakable language to the distinction between the status of married persons residing without the Territory and of those residing within the Territory, As to the former, the law relating to dower remained in force. As to the latter, the law commonly known as the Community Property Law was in force. So that upon the death of James H. Givens, his widow became entitled to a third interest for life of all property of which her husband died seized. This is rendered apparent from an examination of the act regulating descent of real estate, enacted January 16th, 1863, which was in force at the date of the death of James H. Givens. Neither the husband or wife inherited from the other, but were entitled to their rights under the act relating to courtesy and dower.

"The provisions of this act shall in no way affect the title of a husband as tenant by the courtesy, nor that of a widow as tenant in dower." (352.)

Statutes Washington, 1862-3, p. 261-264.

Abbott's Real Property Statutes, pp. 357-377.

This act continued in force until the Act of November, 1875, which provided, among other things, "The provisions of Section 1, as to the inheritance of the husband and wife from each other, apply only to

the separate property of the decedents, and takes the place of tenancy in dower and tenancy by the courtesy which are hereby abolished."

Statutes Washington, 1875, p. 53-55.

Abbott's Real Property Statutes, p. 379.

EJECTMENT CANNOT BE MAINTAINED FOR DOWER.

The authorities are unanimous upon the proposition that before dower has been assigned, the widow cannot maintain ejectment.

It was a well settled principle at Common Law that a widow could not maintain ejectment for dower before assignment.

Doe vs. Nutt, 2 Car & P., 430.

Jackson vs. Vanderheyden, 17 Johnson, 167,

and hence her grantee could not maintain the action,

Carnall vs. Wilson, 21 Ark., 62.

Jackson vs. Dyer, 31 Ark., 334.

Jones vs. Hollopeter, 10 S. & R., 326;

even in those states where by Statute the widow has been enabled to maintain such action.

Galbraith vs. Fleming, 60 Mich., 403.

S. C. 27 N. W. Rep., 583.

Miller's Adm. vs. Woodman, 14 Ohio, 518.

She and the heirs are neither tenants in common, joint tenants or co par ceners.

Reynolds vs. McCurry, 100 Ill., 356.

Pringle vs. Gove, 5 S. & R., 536.

Nor is she a joint tenant with her husband's grantee.

Walker vs. Rand, 130 Ill., 27.

S. C. 22 N. E. Rep., 1006.

ARGUMENT ON FIRST CHAIN OF TITLE.

The deed (Exhibit "A") from Mary A. Givens to plaintiff is not the original deed, but purports to be a certified copy of said deed, from the records of the office of the Auditor of Pierce County. We call attention to the fact that the certificate appended is not attested by the seal of the Auditor.

2 Hill's Code, Section 1685, provides:

"Whenever any deed * * * shall have been recorded or filed in pursuance of law, copies of record of such deed * * * duly certified by the officer

having the legal custody thereof, with the seal of the office annexed, * * * shall be received in evidence to all intents and purposes as the originals themselves."

This, perhaps, might not be very material if it were not for the fact that plaintiff subsequently offered the original deed. When that was produced objection was made to it, that it did not appear that it was ever filed for record or recorded in the office of the Auditor of Pierce County, the county in which the premises are situated, and further, that no proof had been made of its execution. It was further objected that the deed bore on its face evidence of material alterations. These alterations are indicated on the record, page 49.

We desire to call attention to the fact that Exhibit "A," which purports to be a certified copy from the record, is not a copy of the original deed (Exhibit "B".) After the commencement of the deed—"KNOW ALL MEN BY THESE PRESENTS"—the original deed reads "That I, Mary A. Givens, of New Bedford," whereas, the certified copy reads: "That I, Mary A. Givens, widow of James H Givens;" also in the clause "Together with all and singular the tenements, hereditaments," etc., the original deed has the words including "dower and claim of dower," which is not contained in the certified copy.

It is clear that Exhibit "B" was not admissible in evidence, because being an original instrument its exe-

cution must have been proved in the same manner as deeds were proved before certified copies were admissible. We concede that if the deed had been recorded and had a certificate of the auditor to that effect, as provided by Section 204, Vol. 1, Hill's Code, that perhaps that would have been sufficient, but Exhibit "B" does not bear any endorsement of having been filed for record in the office of the Auditor of Pierce County, and there is nothing on its face to warrant the court in receiving it. Even if our objection to the certified copy, for want of the seal of the Auditor, is not considered, we submit that the plaintiff having shown that said original deed was never filed for record, then it is clear that the original deed not being evidence, a certified copy is not.

Meegan vs. Boyle, 19 Howard, 130.

Olcott vs. Bynun, 17 Wall., 44.

Besides this, the deed shows that the conveyance by Mary A. Givens was of her dower, and it also appears, from the face of the deed and from the acknowledgment, that Mary A. Givens was the widow of James H. Givens, and we think the presumption naturally arises from the facts as developed, that Mary A. Givens was only attempting to convey her right of dower.

The next instrument to which we call attention is Exhibit "C." This purports to be a decree of the Circuit Court in a partition suit between plaintiff in this action and a large number of defendants, in which the

court finds that certain parties to the suit were owners of certain distinct parcels, and among others that the plaintiff in this action is the owner of the premises in controversy.

Record, pp. 67-8.

Our objection to this deed is not based on the idea solely that it was made in an action to which defendants were not parties, but upon the ground that it was introduced as a link in plaintiff's title. Now, we are not aware that any court has the power to find title in one person, and in a subsequent action by that person against another be permitted to admit the judgment of the court as evidence of title. The court in the partition suit was not trying title, but simply dividing among a number of persons, who agreed among themselves that each was the owner of a certain undivided interest, and making that undivided interest a specific designated portion of the tract. The court below admitted it upon the theory that the plaintiff in this action obtained the interest of the other co-tenants in the premises in controversy. This may be true, but we submit that unless the plaintiff has shown that these other parties themselves had title, that he has not profited by obtaining their interests.

This decree recites a number of things which are absolutely untrue. There was no issue before the court in that case. The parties might just as well have ex-

changed deeds among themselves, and according to the court below, this in effect is all that the decree accomplished for them.

INVOCATION OF RULE OF COMMON GRANTOR.

But, notwithstanding all this, plaintiff invokes the principle that where the parties to an action in ejectment claim title from the same grantor, neither is at liberty to gain the title anterior to that of the common source. We are aware that this rule has become pretty well established, and that in the main it is a very good rule, but we submit that like every other rule, it has its exceptions. It is true that the courts have seldom been called upon to state the exceptions, but we believe that the case at bar presents circumstances which call upon this court to sustain the view taken by the court below.

We commend to the court the very able and conclusive reasoning by Judge Hanford, found on page 25 of the Record. The Supreme Court of the United States, in the case of

Blight's Lessee vs. Rochester, 7 *Wheaton*, 535,

illustrates an exception to this rule. Both parties claimed title from one John Dunlap. The plaintiffs as heirs, the defendant by purchase. The defendant, Rochester, was in possession of the premises in dispute. John Dunlap, the common source of title, was the heir of James Dunlap. "The defendants alleged and proved that James Dunlap was an alien, and subject to the

King of Great Britain. One of the disabilities of alienage was incapacity to transmit lands to heirs, consequently when he died the next of kin could take nothing by descent." Chief Justice Marshall, in delivering the opinion of the court, said: "If James Dunlap could not be considered as a citizen at the time of his death, the plaintiffs have no title, and the only remaining question arising on the bill of exceptions is, was the defendant restrained on the principle of estoppel, or any other principle, from resisting their claim," and the learned Chief Justice decided in the negative. So we might say here, Mary A. Givens never acquired any title, because she was incapable of taking, by descent, from her husband.

Another exception is where the common grantor had no claim of title or possession, and where the party invoking the rule himself claims under a quit claim deed.

Henry vs. Reichert, 22 Hun., 394.

Plaintiff's deed is a mere quit claim. Surely if she had no title, claim of title or possession, and her deed showed on its face that her title was only a right to dower, her grantee would not be estopped to deny her title, and why should a stranger?

Croade vs. Ingraham, 13 Pick., 33.

Weaver vs. Sturtevant, 12 R. I., 537.

Further, if her interest was but a right to have dower assigned, she was not an owner within the meaning of the statute, and the land was improperly assessed.

Lynde vs. Brown, 143 Mass., 337.

S. C. 9 N. E. Rep., 735.

and she was not liable for taxes assessed to the premises.

Felch vs. Finch, 52 Ia., 563.

S. C. 1 N. W. Rep., 570.

MARY A. GIVENS NOT THE COMMON SOURCE OF TITLE.

The defendants claim title under a tax deed made upon a sale of lands for delinquent taxes, assessed to Mary A. Givens. Plaintiff insists that defendants are thus brought within the rule of common source of title. We deny this assumption. While the property was assessed to Mary A. Givens the Statute provides that, * * * * "The Sheriff must make to the purchaser or his assignee, a deed of the property in fee simple, running in the name of the Territory of Washington."

Code 1881, Sec. 2934.

"A tax deed executed under this act conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned

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Lynde vs. Brown, *143 Mass.*, *337*,

S. C. 9 N. E. Rep., *735*,

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S. C. 1 N. W. Rep., *570*.

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Code 1881, *Sec. 2934*.

"A tax deed executed under this act conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned

by the United States or the territory, in which case it is prima facie evidence of the right of possession."

Code 1881, Sec. 2938.

These sections mean something or nothing. If it is held that the property must be assessed to the person who is the owner, as against all the world, then the last section is useless, for, of course, if so assessed, the purchaser would obtain the absolute title. On the other hand, it is well known that the assessor acts in a ministerial, and not in a judicial capacity in making assessments.

If a list is handed to him he must assess to the person in whose name the property is listed. If no list is given, then the assessor must assess it to the owner, if known, otherwise to "unknown owner."

Code 1881, Secs. 2834, 2836, 2837.

If the assessment was the result of a judicial investigation, then the assessor would perforce, in many instances assess lands to "unknown owners," because of inability to determine who the real owner was.

We think the true construction of the law is in the first instance, to assess property to the person in whose name it is listed on the detail list. That in the absence of such listing the assessor may resort to the record of deeds, and assess it to him who has the apparent ownership. In other cases to "unknown owners."

Payne vs. Lott, 90 Mo., 676.

S. C. 3 S. W. Rep., 402.

Gee vs. Clark, 42 La. An., 918.

S. C. 8 So. Rep., 627.

The fact of assessment to a particular person does not estop that person to deny ownership of the lands, where it is sought to charge his personal estate with the amount of the tax. Surely the fact of purchase by a third person ought not to estop him to deny that the assessed person was the owner. We presume that from purposes of redemption the payment by the assessed person of the taxes would estop the purchaser to dispute the right, because under the sale, and before the period of redemption has expired, the purchaser acquires no rights except a lien on the land for the amount of the taxes, interest and costs.

Code 1881, Sec. 2928.

It is not the interest of any particular individual, but the land itself that is taxed.

Newby vs. Brownlee, 23 Fed. Rep., 320.

Brownlee vs. Marion County, 53 Ia., 487.

S. C. 5 N. W. Rep., 610.

The only consequence, perhaps, of assessing lands to one not the owner would be to exempt the owner from personal liability for the tax.

Jefferson City vs. Mock, 74 Mo., 61.

The failure to redeem works a forfeiture of all interests to the State. The State then executes a deed in the nature of a patent, which is an independent title. "A deed of the property in fee simple, running in the name of the Territory of Washington."

Code 1881, Section 2934.

As was said by the Supreme Court of Ohio in

Gwyne vs. Niswanger, 20 Ohio, 564,

"The party holding such title in proving it, goes no further than his tax deed; the former title can be of no service so him, nor can it prejudice him."

The distinction between a deed given on a judicial sale and one given on a tax sale, under our Statute, is this, that in the former case the plaintiff, holding a deed executed at a judicial sale would be compelled, in order to prove title as against a stranger, to deraign his title from the patent; whereas, in a similar action brought by the holder of a tax deed, under our Statute, the plaintiff would be required to go no farther back than his tax deed. It would not be incumbent upon him to

show that the person, in whose name the property was assessed, was in fact the owner.

We think this is the true test of whether Mary A. Givens is the common source of title.

The case of

Bonds vs. Smith, *106 N. C.*, *553*.

S. C. 11 S. E. Rep., *322*.

cited by plaintiff, is an illustration of this. The court there saying, "It does appear from the pleadings and evidence that he claims under a tax deed for the plaintiff's interest."

The *Code of North Carolina*, *Sec. 3696*, provides:

"If the delinquent * * * shall fail to redeem * * * the sheriff * * * shall execute a deed to the purchaser * * * which shall convey * * * all the estate * * * which the delinquent * * * had at the time of the sale." This statute was passed in 1872, and was incorporated in the Code of 1883.

We submit, in conclusion, that the rule of common source of title, like all rules of evidence, was designed for the purpose of promoting justice, and was not intended to conflict with the other rule that in ejectment a plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adver-

sary's. We do not think it was intended to aid a person confessedly without title, who never had possession, and is unable to prove possession in any one under whom he claims, in ousting a person who is in quiet and peaceable possession of property, especially where that person claims under a title in its nature antagonistic to that of the person claimed to be the common source of title.

Plaintiff in error has devoted considerable space in his brief to attacking the tax deed of defendants. We do not understand that this title is in issue in this case until this court shall determine that plaintiff has proved title sufficient to enable him to recover in the absence of any proof of title on the part of defendants. This is not an equity case, nor does the fact that the bill of exceptions discloses defendant's case enlarge the powers of this court. If the judgment of the court below should be reversed, the cause should be remanded for a new trial. "Sufficient unto the day is the evil thereof." When this court decides that the judgment of the court below was erroneous, it will be time enough to discuss the points urged by plaintiff as to defendant's claim of title.

Respectfully submitted,

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